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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/528,889	03/23/2005	Frank J. Viola	2865(203-3485)	9167

7590 07/26/2006

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EXAMINER

SMITH, SCOTT A

ART UNIT PAPER NUMBER

3721

DATE MAILED: 07/26/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b> 10/528,889	<b>Applicant(s)</b> VIOLA ET AL.	
	<b>Examiner</b> Scott A. Smith	<b>Art Unit</b> 3721	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 02 May 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-10 is/are pending in the application.
- 4a) Of the above claim(s) 10-13 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-9 and 14-20 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date <u>3/23/05</u> . | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Election/Restrictions***

Applicant's election without traverse of species V, directed to Fig. 16 in the reply filed on 5/2/06 is acknowledged.

Claims 10-13 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected species, there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on 5/2/06.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

Claim 19 is rejected under 35 U.S.C. 102(a) as being anticipated by Whitman '973.

Whitman '973 discloses the stapler as claimed including a handle 102, an elongated member 104 having a first portion (at a length on the member 104 at about the location of numeral 130b in Fig. 3), a second portion (at a length on the member 104 at about the location of numeral 136a in Fig. 3), the second portion having an axis parallel to and spaced from the first portion, a fastener applying mechanism 180, and a proximal actuator 110 including a means 108a, 108b for firing the device.

Claims 1-5, 7 and 14 are rejected under 35 U.S.C. 102(b) as being anticipated by Tsuruta et al. '611.

Tsuruta et al. '611 discloses the stapler as claimed including a handle 1 having a manual actuator 6, an elongated member 2 having a first portion, a second portion 511, the second portion having an axis at an angle relative to the first portion, a fastener applying mechanism 4, and a proximal actuator 24.

Claims 1-9, 14 and 20 are rejected under 35 U.S.C. 102(b) as being anticipated by Green et al. '620.

Green et al. '620 discloses the stapler as claimed including a handle 30 having a manual actuator 40, 60, 90, an elongated member 120 having a first portion (adjacent 70b in Fig. 13), a second portion (adjacent 150 in Fig. 13), the second portion having an axis at an angle relative to the first portion and fixed thereto, as broadly claimed, a fastener applying mechanism 200, cables 110, 112 for approximating the jaws and driving the staples.

Claims 1-5, 7, 8 and 14 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Viola et al. '616.

Claims 1-9, 14 and 20 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Clark et al. '871.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the

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invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 15-17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tsuruta et al. '611, Viola et al. '616, Clark et al. '871 or Green et al. '620.

Tsuruta et al. '611, Viola et al. '616, Clark et al. '871 and Green et al. '620 lack clear disclosure as to the angle of the elongated member portions, but do disclose the desirability of angling the portions to allow for greater tool versatility. Therefore, it would have been obvious to one skilled in the art to angle the portions of the staplers of Tsuruta et al. '611, Viola et al. '616, Clark et al. '871 or Green et al. '620 as claimed in order to accommodate preferred operating angles depending upon conditions, and since to determine such angles is within the engineering purview of the skilled artisan.

Claim 18 is rejected under 35 U.S.C. 103(a) as being unpatentable over Tsuruta et al. '611, Viola et al. '616, Clark et al. '871 or Green et al. '620 in view of Green et al.

'933

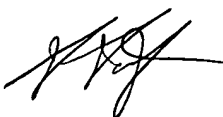
Tsuruta et al. '611, Viola et al. '616, Clark et al. '871 and Green et al. '620 lack the manually actuated knife, as claimed. Green et al. '933 discloses a knife 35 manually actuated by tab 140. In view of the teachings of Green et al. '933, it would have been obvious to one skilled in the art to provide the staplers of Tsuruta et al. '611, Viola et al. '616, Clark et al. '871 or Green et al. '620 with a manually actuated knife to effectively and directly the cutting of tissue.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Scott A. Smith whose telephone number is 571-272-4469. The examiner can normally be reached on 5:30-4:00 Tues.-Fri..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Rinaldi Rada can be reached on 571-272-4467. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

S. Smith



SCOTT A. SMITH  
PRIMARY EXAMINER